AGENDA — June 29, 1999 Business Taxes Committee Meeting Regulation 1589.5, Redemption Payments on Beverage Containers

Action 1 – "Statutory Change vs. New Regulation"		
Regulation 1589.5	Adopt either: 1) Staff's recommendation that a statutory change is required and that the Board should continue to support current legislation which provides the required statutory change; or 2) Industry's proposed regulation	
Action 2 –		
Authorization to Publish	If the Board adopts industry's proposed regulation in Action 1 above, direct the publication of the proposed Regulation 1589.5.	



AGENDA — June 29, 1999 Business Taxes Committee Meeting Regulation 1589.5, Redemption Payments on Beverage Containers

Action Item	Industry's Proposed Language	Staff's Comments
ACTION 1, "Statutory Change vs. New Regulation"		
Exhibit 2	Sales and use taxes do not apply to the amount representing the redemption payment on a beverage container under the California Beverage Container Recycling and Litter Reduction Act (commencing with Section 14500 of the Public Resources Code), provided the dealer separately states and identifies that amount in all advertising of beverage products and on the shelf labels of the dealer's establishment and on the customer cash receipt provided to the consumer.	Industry's proposal is to adopt Regulation 1589.5 to provide that the California Redemption Value is not subject to tax. Staff believes there is no statutory basis for industry's proposed regulation. However, if the Board adopts Regulation 1589.5, staff agrees with the regulatory language provided by industry.



FORMAL ISSUE PAPER STATE OF CALIFORNIA **BOARD OF EQUALIZATION Board Meeting** Issue Paper Number 99-036 \boxtimes **Business Taxes Committee Customer Services Committee** Legislative Committee BOARD OF EQUALIZATION **Property Tax Committee** KEY AGENCY ISSUE Technology & Administration П Committee

APPLICATION OF TAX TO THE CALIFORNIA REDEMPTION VALUE

Other

I. Issue

Should proposed Regulation 1589.5¹ be adopted to clarify that charges to consumers for the California Redemption Value (CRV) are not subject to tax?

II. Staff Recommendation

The proposed Regulation 1589.5 providing that the charges to consumers for the CRV are not subject to tax requires a statutory change to Revenue and Taxation Code sections 6011 and 6012. Consequently, staff recommends the Board continue to support Assembly Bill 622, which would exclude from the definition of "gross receipts" and "sales price" the amount of any redemption payment (CRV) imposed on beverage containers, as specified, thereby excluding those amounts from the computation of the sales and use tax.²

III. Other Alternative(s) Considered

Adopt Regulation 1589.5, Redemption Payments on Beverage Containers, as proposed by industry, to clarify that the payment by a consumer of CRV is not subject to tax.

A new regulation is proposed rather than an amendment to the existing Regulation 1589 because Regulation 1589 is currently being amended for changes approved by the Business Taxes Committee on May 11, 1999. The proposed amendments are not sufficiently related to the amendments published in the original Notice of Regulatory Action to be considered as part of the current amendment process (Govt. Code Sec. 11356.8(c)).

The Board voted to support Assembly Bill 622 at the April 20, 1999, Legislative Committee meeting.

IV. Background

The Beverage Container Recycling and Litter Reduction Act of 1986 ("Act"), which begins with section 14500 of the Public Resources Code, is a legally prescribed container reclamation system. This Act provides that a distributor (wholesaler) is required to pay the Beverage Container Recycling Fund a "redemption payment" for every empty beverage container (other than refillable containers) sold to a dealer (retailer). The redemption payment is generally equal to the CRV amount less the distributor's administrative costs. In the normal course of business, distributors pass on the redemption payment as an expense to retailers, and retailers pass on the redemption payment to consumers, which is usually identified as "CRV" (hereafter the redemption payment passed on by the retailer to consumers will be referred to as "CRV"). The Act provides a financial incentive for consumers to return the containers to authorized recycling centers, which pay these consumers the CRV for each recycled container.

The Act distinguishes between a refillable beverage container, which is a beverage container that has a minimum *deposit* of 3¢ and ordinarily would be returned to the manufacturer to be refilled and resold (Public Resources Code §14525), and other beverage containers subject to the CRV program.

Historically, CRV charges have been considered under Sales and Use Tax Regulation 1589, Containers and Labels. Regulation 1589 explains that deposits are not subject to tax. Regulation 1589 defines the term "deposits" to mean an amount charged to the purchaser of the contents of the container with the understanding that such amount will be repaid when the container or a similar container is delivered to the seller. Effective December 30, 1987, Regulation 1589 was amended to clarify the term "deposits" by excluding from that term "amounts representing redemption or recycling values of beverage containers," whether or not such amounts are separately stated to the purchaser of the contents of the container. Although Regulation 1589 does not set forth the taxability of the CRV, it does provide in its history notes for the October 7, 1987 amendment that "Because redemption or recycling values of beverage containers are not considered deposits, they therefore are includable in the gross receipts of the seller of the containers."

Container *deposits*, which are collected and refunded by the retailer to the consumer when the container is returned to the seller, are distinguishable from the CRV. Consumers reimburse the retailer for the CRV, but through the recycling program the CRV is refunded to consumers by authorized third party recycling centers. Thus gross receipts subject to tax include amounts received from the sale of a beverage and its container including the CRV of the container.

The Act first became operative as to consumers on October 1, 1987. Between this date and October 1, 1989, no retailer was required to separately state the CRV, on a receipt given to the customer or in its advertising, in connection with its sale of beverages in containers subject to the Act. Subsequently, the Legislature wanted to increase recycling by making the public aware that they could recycle

beverage containers and receive cash for those containers, it being the Legislature's intent to promote public awareness by informing consumers of the minimum redemption value (CRV) applied to a beverage container in order to reinforce and expand the recycling of empty beverage containers. (See Section 1 of Stats. 1989, c. 865.) The amendment to the Act adding Public Resources Code §14560.5, effective October 1, 1989, required retailers with sales or storage of over 4,000 square feet to add a descriptive term to the price of those beverages in containers subject to CRV in their advertising and shelf labels, such as "99¢ + CRV." Retailers with square footage of less than 4,000 square feet were not required to show the CRV in their advertising or shelf price; they may advertise a single price inclusive of CRV, "\$1.02," not "99¢ + CRV." The Act also permitted retailers to separately identify, on the cash register receipts, the amount of CRV that applied to a purchase of a beverage container, to the extent it was technically and economically feasible. Beginning in 1989, when retailers began itemizing the CRV amount on receipts given to their customers, some customers raised questions as to the propriety of calculating tax on these amounts.

In 1990, Senate Bill 1933 was introduced by Senator Kopp to expand the exemption for returnable containers by defining returnable containers as those returned by the buyer for reuse or recycling. This legislation intended to change the application of tax by exempting the CRV along with returnable container deposits. The California Retailers' Association noted that the exemption would provide limited tax relief and estimated that, on average, an annual sales tax savings of about \$1.78 would be experienced per household. This bill did not pass out of the Senate Committee on Revenue and Taxation.

In 1994, Assembly Bill 2501 was introduced by Assembly Member Pringle to exempt the CRV. This bill excluded the CRV from the terms "sales price" and "gross receipts." This bill did not pass out of the Assembly Committee on Natural Resources. Senate Bill 2046, similar to Assembly Bill 2501, was introduced by Senator Costa in the 1998 Session. This bill failed to pass out of the Senate Appropriations Committee.

In the current legislative session, Assembly Bill 622 has been introduced by Assembly Member Olberg to amend sections 6011 and 6012 of the Revenue and Taxation Code to specify that "gross receipts" and "sales price" do not include the amount of any redemption payment (CRV) imposed on beverage containers pursuant to specified provisions of the Public Resources Code, and identified for the consumer pursuant to that Code. Assembly Bill 622 passed the Assembly Revenue and Taxation Committee and was heard by the Assembly Committee on Appropriations on May 26, 1999, where it was held under submission.

Discussion of the Issue

Shortly after the CRV program was enacted, the issue of the application of sales and use tax arose. In its March 19, 1987 analysis, the Office of the Legislative Counsel addressed the sales tax and other issues. The analysis, in part, stated:

"The sales and use tax applies to the increased cost of a beverage passed along to the consumer by the dealer, regardless of whether the invoice from the distributor to the dealer indicates a separate charge or the receipt issued the consumer clearly indicates a separate charge for the minimum redemption value." The analysis further states: "The act requires a distributor to pay the minimum redemption value of every beverage container sold or transferred to a dealer, but the act does not require a dealer to charge the consumer any increased amount. The Legislature made a finding in Public Resources Code section 14562 that the minimum redemption value is a regulatory fee." This fee, being imposed on the distributor and passed on to the retailer then to the consumer, is an expense to the retailer.

In its analysis, the Office of the Legislative Counsel stated that, "the sale of beverages is not exempt from the sales and use tax and the fee imposed upon the distributor is a part of the gross receipts from the sale of the beverage for the purpose of the sales tax. Whether the invoice from the distributor to the dealer states the fee separately or whether the receipt issued the consumer indicates a separate charge for the fee is irrelevant for the purposes (of sales and use tax³), since the fee is a part of a cost of the goods being purchased."

It is not unique to include the cost of a fee such as the CRV in the measure of sales and use tax. As with any other overhead expense, the cost of fees and taxes which are imposed upon manufacturers or distributors of various commodities are invariably passed on to retailers who in turn pass that cost on to their purchasers. Since those costs passed through to the ultimate consumer are part of the selling price of the commodity, they are included in the measure of the retailer's sales tax, and the retailer accordingly collects reimbursement on these costs as well as on the remaining amount of the retail selling price of the property. Examples of this are excise taxes imposed on alcoholic beverages, cigarettes, and various motor vehicle fuels, as well as general property taxes and net income taxes. Like CRV, these fees and taxes are expenses to the retailer associated with the cost of doing business, and any charges related to these expenses which are passed on to the consumer are considered part of the selling price of the property sold.

Added "of sales and use tax" for clarity.

A new regulation is proposed rather than an amendment to the existing Regulation 1589 because Regulation 1589 is currently being amended for changes approved by the Business Taxes Committee on May 11, 1999. The proposed amendments are not sufficiently related to the amendments published in the original Notice of Regulatory Action to be considered as part of the current amendment process (Govt. Code Sec. 11356.8(c)).

Discussion - Proposed Regulation 1589.5

Initially, Mr. Frederick Richman of O'Melveny & Myers LLP (hereafter "industry") proposed amending Sales and Use Tax Regulation 1589, Containers and Labels, to add language to exclude the CRV from the measure of tax (Exhibit 3). After further discussions, industry submitted proposed regulatory language for proposed Regulation 1589.5⁴.

Industry believes the CRV should not be included as part of the price paid for the beverage product under the Revenue and Taxation Code since the Legislature did not consider it as part of the price of the beverage product. Industry points out that the Legislature expressly stated in the Act that a retailer "shall not include the [CRV] in the total price of a beverage container" (§ 14560.5(c)(3)).

Industry also believes that the CRV should not be considered as part of the price paid for the beverage product since the Legislature did not amend the Revenue and Taxation Code to provide that the CRV should be treated as part of the "sales price" for sales tax purposes.

Furthermore, industry points out that CRV was enacted as a substitute for "deposits," which the State Board of Equalization had long treated as non-taxable and the Legislature was not informed that its enactment of the CRV would result in any increased taxes. Industry believes the Legislature could not possibly have intended to impose a new sales tax by enacting the Act.

Staff believes the CRV is subject to tax and that a statutory change is required for the charge to be exempted or excluded from the definition of "gross receipts" and "sales price."

The Act requires a distributor to pay the minimum redemption value of every beverage container, other than a refillable beverage container, sold or transferred to a retailer (dealer), but the Act does not impose that redemption value (CRV) on the consumer nor does the Act require a retailer to charge the consumer any increased amount. Therefore, staff believes any increased amount charged to the consumer by a retailer constitutes the cost of the property sold and is included in the definition of "sales price" under Revenue and Taxation Code section 6011 and in the definition of "gross receipts" under Revenue and Taxation Code section 6012.

The sales tax is imposed on the gross receipts from the sale of personal property at retail, which is paid by the retailer, and a complementary use tax is imposed on the storage, use, or other consumption of tangible personal property which is measured by the purchase price of the property.

"Gross receipts" is defined by section 6012 of the Revenue and Taxation Code as meaning the total amount of the sale price, without deduction for the cost of the property sold, materials used, labor or service cost, interest paid, losses, or any other expense. "Sales Price" is defined by section 6011 of the Revenue and Taxation Code as meaning the total amount for which tangible personal property is sold without deduction for the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

Subdivision (c) of sections 6011 and 6012 of the Revenue and Taxation Code excludes from the definition of gross receipts the amount of any city and county or rapid transit district taxes, as well as state motor vehicle fees and taxes. A legislative enumeration of certain exceptions by necessary implication excludes all other exceptions (People ex rel. Cranston v. Bonelli, 15 Cal. App 3d 129, 135). That is, the Legislature has excluded certain fees and taxes from the measure of tax when it intended that such be the case, but it did not do so in the case of the cost of the CRV. Thus, it cannot be implied that the Legislature intended to exclude from the measure of tax that cost passed on to consumers. This means that just as with any other overhead expense of the retailer passed on to the consumer, the increase in the cost of a beverage due to the inclusion of the cost of a fee paid by the distributor is part of the retailer's taxable "gross receipts."

Furthermore, staff believes it is irrelevant that the invoice from the distributor to the dealer states the fee separately or whether the receipt issued the consumer indicates a separate charge for the fee since the fee is a part of a cost of the goods being purchased. There is no difference in the purpose of the CRV as between large retailers covered by the requirements of section 14560.5 of the Public Resources Code and smaller retailers not covered by that section who do not separately state their cost of the CRV to the retail purchasers.

The CRV does not fall within the definition of a deposit and thus does not qualify for the exemption provided by section 6364(c) of the Revenue and Taxation Code. Unlike a refillable beverage container for which a deposit is required, the subject beverage containers are not returned for reuse and refilled with beverages, but rather are melted, crushed, or shredded, and are then sold to purchasers who include not only beverage container manufacturers, but also others including end users.

V. Staff Recommendation

A. Description of the Staff Recommendation

The proposed Regulation 1589.5 providing that the charges to consumers for the CRV are not subject to tax requires a statutory change to Revenue and Taxation Code sections 6011 and 6012. Consequently, staff recommends the Board continue to support Assembly Bill 622 which would exclude from the definition of "gross receipts" and "sales price" the amount of any redemption payment (CRV) imposed on beverage containers, as specified, thereby excluding those amounts from the computation of the sales and use tax.

Until there is a statutory basis, the CRV charged to consumers in connection with the sale of certain taxable beverages in nonrefillable beverage containers should remain includable in taxable gross receipts since the CRV represents an expense of the retailer. The CRV is not a regulatory fee or tax imposed upon consumers. Rather, it is a regulatory fee imposed on distributors, the cost of which is passed on and ultimately reflected in the price paid by the consumer.

B. Pros of the Staff Recommendation

• This recommendation would provide the required statutory basis to exclude the CRV from the definition of "sales price" and "gross receipts" under sections 6011 and 6012 of the Revenue and Taxation Code, respectively.

C. Cons of the Staff Recommendation

• Consumers would continue to question the inclusion of the CRV in the amount subject to tax.

D. Statutory or Regulatory Change

In the current legislative session Assembly Bill 622 was introduced by Assembly Member Olberg to amend sections 6011 and 6012 of the Revenue and Taxation Code to specify that "gross receipts" and "sales price" do not include the amount of any redemption payment (CRV) imposed on beverage containers pursuant to specified provisions of the Public Resources Code, and identified for the consumer pursuant to that Code.

E. Administrative Impact

None.

F. Fiscal Impact

Staff recommends the Board continue to support Assembly Bill 622 to exclude the California Redemption Value (CRV) from the computation of the sales and use tax. If the pending legislation becomes law, the estimated annual revenue loss would be \$28.4 million (Exhibit 1).

G. Taxpayer/Customer Impact

None.

H. Critical Time Frames

None.

VI. Alternative

A. Description of the Alternative

Adopt Regulation 1589.5, Redemption Payments on Beverage Containers, as proposed by industry to clarify that the payment by a consumer of CRV is not subject to tax.

B. Pros of the Alternative

- This alternative does not involve legislative action.
- Consumers and retailers would experience a tax savings measured by the CRV charged when making taxable purchases of certain beverages.
- Consumers frequently draw a parallel between deposits on returnable containers and the CRV on nonreturnable/nonrefillable containers. Applying the tax consistently to both of these charges would reduce confusion for consumers.

C. Cons of the Alternative

- Requires a new regulation.
- Retailers would be faced with new compliance costs of reprogramming cash registers.
- The exemption would result in a revenue loss.

D. Statutory or Regulatory Change

No statutory change, but requires the adoption of a new regulation.

E. Administrative Impact

The cost to notify affected taxpayers would be absorbable.

F. Fiscal Impact

It is estimated that an annual revenue loss of \$28.4 million will be experienced (Exhibit 1).

G. Taxpayer/Customer Impact

- Taxpayers and customers will experience nominal tax relief.
- Some taxpayers will be required to reprogram cash registers.

H. Critical Time Frames

The issue is not critical, but should be addressed as expeditiously as possible.

Prepared by: Program Planning Division, Sales and Use Tax Department

Current as of: July 15, 1999

BOARD OF EQUALIZATION REVENUE ESTIMATE

CALIFORNIA REDEMPTION VALUE ON NONREFILLABLE BEVERAGE CONTAINERS

Proposal

Staff recommends the Board continue to support Assembly Bill 622 to exclude the California Value (CRV) from the computation of the sales and use tax.

Background, Methodology, and Assumptions

According to the Department of Conservation, the amount of California Redemption Value that will be collected on nonrefillable beverage containers for fiscal year 1999-00 is estimated to be \$358 million.

Revenue Estimate

The revenue impact from excluding the \$358 million California Redemption Value collected on nonrefillable beverage containers from the measure of tax for sales and use tax purposes would be as follows:

Revenue Effect

State loss (5%)	\$ 17.9 million
Local loss (2.25%)	8.1 million
Transit loss (0.67%)	2.4 million
Total	\$ 28.4 million

Preparation

This revenue estimate was prepared by David E. Hayes, Statistics Section, Agency Planning and Research Division. This revenue estimate was reviewed by Ms. Laurie Frost, Chief, Agency Planning and Research Division and Ms. Freda Orendt-Evans, Program Planning Manager, Sales and Use Tax Department. For additional information, please contact Mr. Hayes at (916) 445-0840.

Current as of July 15, 1999.

Regulation 1589.5 Redemption Payments on Beverage Containers Analysis of Proposed Industry Language

Analysis of Proposed Industry Language				
Action Item	Industry's Proposed Regulatory Language	Staff's Comments		
ACTION 1 "Statutory Change vs. New Regulation"	Sales and use taxes do not apply to the amount representing the redemption payment on a beverage container under the California Beverage Container Recycling and Litter Reduction Act (commencing with Section 14500 of the Public Resources Code), provided the dealer separately states and identifies that amount in all advertising of beverage products and on the shelf labels of the dealer's establishment and on the customer cash receipt provided to the consumer.	Staff believes there is no statutory basis for industry's proposed regulation to provide that the California Redemption Value is not subject to tax. However, if the Board adopts Regulation 1589.5, staff agrees with the regulatory language provided by industry.		

PROPOSAL TO AMEND REGULATION 1589 (CONTAINERS AND LABELS)

A. SUMMARY OF PROPOSAL.

This is a proposal to amend Sales & Use Tax Regulation 1589 (Containers and Labels) to clarify the treatment of the California Redemption Value ("CRV"). The CRV is a statutory amount that a consumer pays to a retailer at the time the consumer purchases beverages in non-refillable containers. The CRV is returned to the consumer when the consumer later delivers the empty containers to a recycler.

The California Beverage Container Recycling and Litter Reduction Act (the "Beverage Container Act") provides that retailers meeting certain criteria must separately identify the CRV in all advertising and shelf labels and "shall not include the [CRV] in the total price of a beverage container" Public Resources Code § 14560.5(c)(3). The issue is whether, under those circumstances, the CRV is part of the "sales price" of the beverage container under Revenue & Taxation Code § 6011.

Neither Rev. & Tax. Code § 6011 nor Regulation 1589 address this issue. Section 6011 provides generally that the "sales price" means the "total amount for which tangible personal property is sold" and specifies that (a) there is no deduction for the cost of the property sold or any expenses of the retailer, (b) services that are part of the sale, credit given to the purchaser by the seller, and certain specified taxes are *included* in the sales price, and (3) cash discounts, amounts for returned property, installation labor or services, and certain specified taxes and other amounts are *excluded* from the sales price. Section 6011 thus specifies that certain amounts are either (1) included in, or (2) excluded from, the "sales price," but section 6011 does not mention CRV in either category.

Regulation 1589 currently provides only that the CRV is not a "deposit" as defined in that regulation. The rationale is that a "deposit" is an amount returned to the purchaser by the seller and the CRV is returned by a third party (the recycler). In a recent annotation, the Board's staff concluded that because the CRV is not a "true deposit," and because there is no express exclusion for CRV from the measure of tax, the CRV must be treated as simply an "expense" of the retailer. Annot. 295.0035.820 (7/10/96). But treating the CRV as not a "deposit" simply makes the containers "nonreturnable" containers under Regulation 1589 and Rev. & Tax. Code § 6364 (the section that Regulation 1589 interprets). The regulation does not provide that the CRV is part of the "sales price" under § 6011 or that it is simply an "expense" of the retailer under that section.

Even if the CRV is not a "deposit," the CRV cannot properly be treated as part of the "sales price" where the Legislature has expressly directed in the Public Resources Code that the retailer "shall **not** include the [CRV] in the total price of a beverage container" (emphasis added). The relevant sections of the Public Resources Code indicate the Legislature intended that the CRV represent a separately advertised and separately priced fee — a financial incentive for consumers to recyle their containers. The Legislature established a mechanism under which consumers would pay a separately-identified amount at the time they purchased non-refillable containers and would recover that same amount from recyclers upon turning in the containers. The Legislature did not want the CRV included in the total price of a container and said so expressly.

The proposal set forth below would not affect the treatment of CRV as not a "deposit" for purposes of Regulation 1589. Instead, the proposal would recognize that the CRV is a separate payment paid for a statutory refund right. The proposal would thus add the following underlined language to the fourth paragraph of section 1589(a) and the final sentence of section 1589(b)(1):

The term "deposit" as used herein means an amount charged to the purchaser of the contents of the container with the understanding that such amount will be repaid when the container or a similar container is delivered to the seller. The term "deposit" as used herein does not include amounts representing redemption or recycling values of beverage containers pursuant division 12.1 (commencing with Section 14500) of the Public Resources Code (the "Beverage Container Act") whether or not such amounts are separately stated to the purchaser of the contents of the container. Where a retailer (1) separately states the redemption or recycling value in all advertising and shelf labels with respect to a beverage product, (2) separately states the price of the beverage product in all such advertising and labels, and (3) separately states the price of the beverage product and amount of the redemption or recycling value on the cash register receipt provided to the consumer, the payment by the consumer of the redemption value is not part of the sales price of the beverage product, but rather is the non-taxable purchase of a right to a cash refund pursuant to the Beverage Container Act.

* * *

Deposits <u>and redemption values</u> as defined herein are not taxable.

B. ANALYSIS OF PROPOSAL.

Pursuant to the Beverage Container Act, every non-refillable beverage container sold in California must be labeled to show the "California Redemption Value" (which may also be labeled as "California Cash Refund" or "CA Cash Refund" or "CA Redemption Value"). Public Resources Code § 14561. At any retail location with a sales and storage area of more than 4,000 square feet, the retailer selling beverages in such containers must separately identify the CRV in all advertising of the products and on the shelf labels of the retail establishment. § 14560.5(c)(1). Such a retailer "shall not include the redemption payment in the total price of a beverage container in any advertising or on the shelf of the dealer's establishment." § 14560.5(c)(3).

Pursuant to an express statutory authorization, the retail establishment may also separately identify the CRV on the customer cash register receipt provided the consumer. Public Resources Code § 14560.5(b). When a consumer purchases beverages in containers from a retailer that follows the above statutory provisions, the retailer charges the advertised or shelf price for the beverage product and adds the CRV as a separate and distinct item, just as the Legislature intended.

The purpose of the CRV is to encourage consumers to recycle their empty containers after they are used, in return for a statutorily-mandated payment. If the consumer returns the empty container to a recycler, the recycler must pay the CRV to the consumer. Public Resources Code § 14572. The pricing provisions found in the Public Resources Code are intended to make the CRV a separate and distinct item that is clearly visible as such to the consumer, and serves to insure that the CRV is clearly portrayed as a separate statutory refund obligation to the consumer. ¹

The purpose of the Beverage Container Act is to provide "financial incentives" to "ensure the efficient and large-scale recycling of beverage containers." Public Resources Code § 14501(a). The CRV is the statutory payment established to accomplish this result. The Legislature clearly indicated that, to the extent technically and economically feasible, it did not want the CRV included in the price of the beverage product, but rather wanted it treated as a separate amount identified as a "fee" that would be returned to the consumer upon recycling.

Once a consumer recycles a container, the recycler sells the container to a processor, who must pay the recycler the CRV. *See* Public Resources Code § 14524. The processor sells the container to the Beverage Container Recycling Fund (the "Fund"), which must pay the CRV to the processor. § 14573. The Fund obtains its moneys from distributors of the containers, who initially pay the CRV into the Fund. § 14560. The distributor separately identifies the CRV in the invoice submitted to the retailer. § 14560.5(a)(1). *Thus, at each stage in the statutory system, the CRV is treated as a separate item.*

The purchase of a beverage in a recyclable container thus consists of **two** payments and **two** transactions: (1) the **price** charged for the beverage and the container (at a price determined by the retailer), and (2) the **CRV**— a separate payment specified by the Legislature, separately accounted for as such by the distributor and the retailer, separately identified on customer receipts pursuant to an express statutory authorization to do so, and representing a separate statutory right to a refund of the amount of the CRV payment upon the return of the container pursuant to the statutory program. Like a deposit, the CRV is not part of the purchase price of tangible personal property, but rather is a separate payment for a separate right — at least under those circumstances where the retailer treats the CRV as a separate item in the retailer's pricing, advertising and customer receipts.

The Legislature has not enacted any provision that addresses the treatment of the CRV for California sales and use tax purposes. Section 6011 of the Revenue and Taxation Code sets forth in detail (1) certain charges that must be **included** in the "sales price" – section 6011(b), and (2) certain charges that must be **excluded** from the "sales price" – section 6011(c). Neither subsection addresses the CRV charge, nor does any other part of section 6011. Moreover, the CRV is not an "expense" of the retailer as that term is used in section 6011, since "expenses" are items that cannot be used to reduce the sales price of the property; the term does not refer to amounts that the Legislature directs should not be included in the sales price in the first place.

Regulation 1589 does not address the CRV, except to provide that it is not a "deposit." This affects the classification of containers as "returnable" or "non-returnable" for purposes of the exemption set forth in Rev. & Tax. Code § 6364, but it does not address the issue presented by this proposal: whether under § 6011 the CRV should be treated as (1) part of the price charged for tangible personal property, or (2) a separate payment for a right to a statutory refund, pursuant to a system that contemplates the separate treatment of that payment.

Under the above circumstances, the Board is free to address this issue and clarify its existing regulation to set forth the proper treatment of the CRV. The staff notes there have been unsuccessful attempts in the Legislature to amend the Revenue & Taxation Code to expressly provide that CRV is not subject to sales tax. But the courts have repeatedly held that unpassed bills are generally **not** indicative of legislative intent.²

² Santa Clara County Local Transp. Auth. v. Guardino, 11 Cal.4th 220, 238 (1995) ("Unpassed bills, as evidence of legislative intent, have little value"); Grupe Dev. Co. v. Superior Ct., 4 Cal.4th 911, 923 (1993); Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal.3d 1379, 1396 (1987); Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 735, fn. 7 (1982); Marshall v. McMahon, 17 Cal. App. 4th 1841, 1849, fn. 7 (4th Dist. 1993); Miles v. Workers' Comp. Bd., 67 Cal. App. 3d 243 249, fn. 4 (3rd Dist. 1977); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41 (1968).

The intent of the Legislature that adopted the act in its present form is controlling, and the Legislature's failure to pass an amendment to existing law does not necessarily indicate the intent of the prior Legislature. ³ In the few instances where legislative failure to amend a section is cited by a court as indicative of the intended scope of existing law, a host of other affirmative expressions of the original legislative intent are present. ⁴ In the present case, there is no evidence at all that the Legislature, when it enacted the Beverage Container Act, intended to impose tax on the CRV, particularly since the CRV was intended as a replacement for non-taxable "deposits." On the contrary, since no revenue estimate was given to the Legislature indicating that increased sales taxes would result from enactment of the CRV, it would be more logical to infer that the Legislature did not intend any such result.

If the Legislature intended — in a marked departure from the treatment of deposits — that the CRV be treated as part of the "sales price" of the beverage product, the Legislature would have said so in the Beverage Container Act. Instead, the Legislature stated the opposite: it provided that retailers "shall **not** include the [CRV] in the total price" (emphasis added).

In summary, there is no justification for the Board to treat the CRV as part of the price paid for the beverage product under section 6011 of the Revenue & Taxation Code where:

- 1. The Legislature that adopted the Beverage Container Act was <u>not</u> informed that its enactment of the CRV would result in any increased taxes, and the Legislature thus could not possibly have intended to impose a new sales tax by enacting the Beverage Container Act.
- 2. The CRV was enacted as a substitute for "deposits," which had long been treated as non-taxable;
- 3. The Legislature clearly did <u>not</u> consider the CRV as part of the price of the beverage product on the contrary, the Legislature expressly stated in the Beverage Container Act that a retailer "shall <u>not</u> include the [CRV] in the total price of a beverage container" (§ 14560.5(c)(3)); and
- 4. The Legislature has <u>not</u> amended section 6011(b) of the Revenue & Taxation Code to provide that the CRV should be treated as part of the "sales price" for sales tax purposes.

Dated: July 2, 1999

³ See, e.g. Burgess v. Bd. of Ed., 41 Cal. App. 3d 571, 580-581 (2d Dist. 1974); United Milk Producers v. Cecil, 47 Cal. App. 2d 758, 769 (1941).

⁴ See Pearson v. State Social Welfare Bd., 54 Cal.2d 184 (Cal. 1960); Seibert v. Sears, Roebuck & Co., 45 Cal. App. 3d 1 (1st Dist. 1975).